STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-653

April 6, 2001

CENTRAL MAINE POWER COMPANY
Request for Commission Investigation
Regarding the Plans of Boralex Stratton Energy, Inc.
to Provide Electric Service Directly from
Stratton Lumber Company

ORDER DECLINING TO
OPEN INVESTIGATION

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

Through this Order, we decline to open an investigation regarding Boralex Stratton Energy's (Boralex) plans to provide electric service to Stratton Lumber Company. We conclude, based on the pleadings, that Boralex's planned activity would not make it either a transmission and distribution (T&D) utility or a competitive electricity provider (CEP). Thus, a formal investigation to obtain further facts is not warranted.[1]

II. BACKGROUND

A. CMP Compliant

On August 1, 2000, Central Maine Power Company (CMP) petitioned the Commission, pursuant to 35-A M.R.S.A. § 1302(3), to open an investigation regarding the plans of Boralex to provide electric service directly to Stratton Lumber. Specifically, CMP requests that the Commission determine whether the planned activity would make Boralex either a CEP or a T&D utility.

In its Petition, CMP states that Stratton Lumber operates a sawmill in Eustis, Maine. Stratton receives T&D service from CMP. Boralex owns and operates a 40 MW biomass-fired electric generating plant located on property adjacent to Stratton Lumber. CMP states that it has become aware that facilities have been installed to allow Boralex to provide electric service directly to Stratton Lumber. If Stratton Lumber is allowed to take electric service directly from Boralex, CMP states it would lose approximately $150,000 in annual revenues.

CMP asserts that 35-A M.R.S.A. § 1302(3) provides the legal basis for its complaint, in that the provision allows a public utility to make complaint to the Commission as to any matter affecting it own product, services or charges. Because Boralex's service to Stratton Lumber would eliminate CMP's provision of T&D service

[1] Commissioner Diamond voted against this decision. See separate Dissenting Opinion.

and could result in shifting costs to other customers, CMP argues that the prerequisites of 35-A M.R.S.A. § 1302(3) are satisfied.

On the merits of the issues presented, CMP claims that Boralex's planned service to Stratton Lumber would make it both a CEP and a T&D utility. According to CMP, Boralex would be a CEP as a result of making retail sales of electricity to a member of the public. CMP argues that the mere fact that Boralex may make retail sales to a single customer does not affect the analysis of whether it is acting as a CEP, because the Restructuring Act does not refer to the number of targeted customers and Boralex (as may be the case with other CEPs) has chosen a niche market based on geography. CMP argues that if Boralex is not considered a CEP, it will have an unfair advantage over other CEPs that have to comply with statutory and regulatory requirements.

CMP also states that Boralex would be a T&D utility because it will own and control T&D plant for public use. CMP asserts that Boralex's planned activity satisfies the Commission's test for "public use" in that Boralex is a large entity and its arrangement with Stratton Lumber is presumably motivated by profit. CMP states that an investigation would yield further information relevant to the "public use" standard.

B. Boralex Response

On September 11, 2000, Boralex filed a response to CMP's request for an investigation, urging the Commission to deny CMP's request. Boralex states that it and Stratton Lumber have benefited from a symbiotic relationship since the construction of the biomass facility in 1984. Stratton Lumber was essential to the location of the facility in Eustis due to the mutually beneficial biomass disposal and power supply relationship with Boralex. Boralex sells its energy to the wholesale market through CMP's system, with the sole exception of the power proposed to be sold directly to Stratton Lumber. Boralex states that there will be no other retail power transactions.

Boralex argues that 35-A M.R.S.A. § 1302(3) does not provide the Commission with jurisdiction over the activities of a private company on the basis that those activities have the potential to affect CMP's rates. If this were the case, CMP would be able to file a complaint against any alternative provider of energy or conservation services on the grounds that their activities could impact CMP's rates.

Boralex also argues that, under Maine law, it is neither a CEP nor a T&D utility. Boralex states that it is not a CEP because it is not providing service through a T&D utility and thus not providing generation service as defined by 35-A M.R.S.A. § 3201(18). Additionally, Boralex claims that the Restructuring Act was not intended to transform electric generators that were not public utilities before restructuring into CEPs after restructuring, and that Boralex does not sell electricity to the public at retail (the statutory requirement for an entity to be a CEP) because a sale to one person does not constitute a sale to the "public." Boralex argues that it is not a T&D utility because T&D facilities must be for "public use" pursuant to statute, 35-A M.R.S.A. § 102(20-A), and

Commission precedent, and it does not own any property available to or open to the public.

C. CMP Reply

On September 19, 2000, CMP filed a reply to Boralex's response, stating that the alleged "special" relationship between Boralex and Stratton Lumber does not justify excepting the proposed transaction from Commission regulation. According to CMP, this case presents significant legal and policy decisions regarding the propriety of generators' selling directly to their neighbors. CMP states that a clear message must be sent that this type of activity is an unlawful infringement upon utilities' franchise service territories, as well as an unfair method by which unlicensed generators compete with licensed CEPs.

CMP disputes Boralex's claim that it is not a T&D utility because its planned activity does not meet the "public use" standard, and urges the Commission to analyze the situation, considering all relevant factors pursuant to Commission precedent. CMP also argues that the statutory definition of CEP does not refer to the number of targeted customers, 35-A M.R.S.A. § 3201(5), and, thus, the mere fact that Boralex may sell to only one customer does not affect the analysis of whether Boralex is a CEP. According to CMP, Boralex has chosen a niche market based on geography that happens to currently include one customer.

III. DISCUSSION

A. Statutory Authority

We review CMP's petition pursuant to our general investigatory authority under 35-A M.R.S.A. §§ 1303 and 3203(13-A). Section 1303 authorizes the Commission to conduct a summary investigation into "any matter relating to a public utility" and, if sufficient grounds are found, to initiate a formal investigation into the matter. Section 3203(13-A) provides the Commission with similar authority to investigate matters related to CEPs.

The essence of CMP's complaint is the allegation that Boralex's contemplated activity would violate Title 35-A in that Boralex will be acting as a T&D utility without proper Commission authority and as a CEP without the required license. Boralex does not dispute that the Commission has jurisdiction under its general investigatory authority to determine whether an entity is acting in violation of Title 35-A. We agree that our investigatory authority under sections 1303 and 3203(13-A) is the proper procedural vehicle for us to consider CMP's complaint regarding the activity of Boralex.

Because we decide to consider CMP's complaint pursuant to our sections 1303 and 3203(13-A) authority, we do not reach the issue of whether a complaint alleging that an entity is acting as a utility or CEP without authority could be

brought by a utility under section 1302(3). We note, however, that the determination of the statutory authority (either section 1303 or 1302(3)) upon which we proceed in this matter is of little consequence. As stated above, CMP's complaint is essentially a request that the Commission investigate whether an entity is acting in violation of the provisions of Title 35-A. In such a circumstance, as long as the request has a reasonable basis, we would investigate to determine whether an entity may be acting as a utility or a CEP in violation of statute.

B. Status as T&D Utility

We conclude that Boralex's planned service to Stratton Lumber, as described in the Boralex pleading,[2] does not constitute T&D service. Our conclusion is based on the statutory definitions of T&D utility and T&D plant. A T&D utility is defined, in relevant part, as:

> a person, its lessees, trustees or receivers or trustees appointed by a court, owning, controlling, operating or managing a transmission and distribution plant for compensation within the State . . .

35-A M.R.S.A. § 102(20-B). T&D plant is defined as:

> all real estate, fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate the transmission, distribution or delivery of electricity for light, heat or power for *public use* and includes all conduits, ducts and other devices, materials, apparatus and property for containing, holding or carrying conductors used, or to be used, for the transmission or distribution of electricity for light, heat or power for *public use*. (emphasis added)

35-A M.R.S.A. § 201(20-A). The question presented is whether the Boralex facilities which may be considered T&D plants are "for public use" by virtue of a direct sale of electricity to Stratton Lumber.

The Commission has historically analyzed the question of "public use" based on the specific facts and circumstances. Typically, the Commission employed a "public use" test that includes consideration of seven factors, none of which is viewed as conclusive. The seven factors, originally articulated in *Kimball Lake Shore Ass'n*, M.221 (Jan. 31, 1980), are:

[2] CMP does not dispute any of the facts in the Boralex pleading that are relevant to the determination of whether Boralex is or will be acting as a T&D utility or a CEP. We thus accept these facts for purposes of our analysis.

- the size of the enterprise
- whether the enterprise is operated for profit
- whether the system is owned by the user(s)
- whether the terms of service are under the control of its users
- the manner in which the services are offered to prospective user(s)
- limitation of service to organization members or other readily identifiable individuals

- whether membership in the group (e.g., whether taking service) is mandatory

See also, Request for Commission Investigation into Central Monhegan Power, Docket No. 96-481 (Oct. 17, 1996); *Bernard D. Radcliffe v. Weld Inn*, Docket No. 89-312 (June 11, 1990); *New England Telephone Company*, Docket No. 84-208 (June 20, 1985).

The *Kimball Lake* factors, however, were developed primarily to aid us in determining whether the provision of service to relatively few customers under circumstances where the customers have little or no feasible options constitutes "public use," thus subjecting the provider to regulation as a public utility. We find that the *Kimball Lake* factors have no relevance in the context of the current proceeding, which involves a customer that has access to the services of an established utility, but would like to take service from an alternative provider.[3]

The question of public use in the context of this case implicates the meaning of T&D utility franchises and service territories, and involves issues of utility bypass, the opportunity of T&D utilities to recover stranded costs, and the potential for the shifting of such costs among ratepayers. The basic regulatory framework in Maine, as in most jurisdictions, is that utilities have an obligation to serve customers in defined service territories at rates that are regulated; in return, competition within utility service territories is restricted. *Dickinson v. Maine Public Service Co.*, 223 A.2d 435, 438 (Me. 1966). This policy is embodied in 35-A M.R.S.A. § 2102, which requires Commission authority before a second utility can provide service in the territory of an existing utility. It is within this basic statutory scheme that we construe the public use test in this proceeding.

The statutory language provides little guidance in resolving the utility status issue presented in this case. However, based on the general purposes of the statutory scheme, we conclude that the Legislature did not intend the "public use"

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[3] During oral argument, Boralex argued that entities have relied on the *Kimball Lake* factors in planning their operations. We note that the *Kimball Lake* factors are more of a list of considerations, rather than a firm test. Because it would always be difficult to predict how the Commission would weigh the various considerations, we do not believe reasonable expectations are frustrated by the abandonment of *Kimball Lake* in analyzing the type of issues raised in this proceeding.

requirement to be a means to allow for the gradual degradation of utility service territories through the direct sale of services to single customers or limited sets of customers that may be in the proximity of a generating facility. A single customer is a member of the public and, therefore, a sale to a single customer could meet the public use test and constitute a utility sale. The primary question is not the number of customers served, but rather whether the sale is "public" or "private" in nature. To determine if the transaction is private in nature and thus not a utility service, we will consider whether:

- the generator and customer are located on the same or physically adjacent property;

- the generator and customer have a commercial or corporate relationship that goes beyond the sale of electricity;

- the number of customers served or could be served is limited;

- all the power sold comes from the generator as opposed to the utility grid; and

- there are no sham transactions to create a private character regarding the sale

We do not conclude that each of these considerations must be satisfied to find that a particular sale or transaction is a private rather than a utility service. However, if all the factors are satisfied, we conclude that the public use test is not met and the entity in question is not a public utility.

In light of these considerations, we conclude that Boralex would not be a T&D utility by virtue of a direct sale of electricity from its generating facility to Stratton Lumber. As described in the Boralex pleading and attached affidavit, Boralex and Stratton Lumber have a long-standing relationship which includes mutually beneficial waste disposal transactions. The generating facility was located on adjacent property due to the existence of Stratton Lumber. Boralex has a continuing interest in the economic success of Stratton Lumber as the source of part or all of its fuel supply, and Stratton Lumber will be the sole retail customer of Boralex under a particularized, individually negotiated arrangement. The Boralex facilities will not be available to other retail users. Finally, there is no indication that any sham transactions exist to avoid utility status. Based on these circumstances, Boralex's facilities are not for public use and the transaction is of a private nature. Thus, Boralex is not a T&D utility.

C. Status as a CEP

We also conclude that the direct sale of electricity from Boralex's facility to Stratton Lumber would not make Boralex a CEP under the statute. Section 3201(5) defines a CEP as:

> A marketer, broker, aggregator or any other entity selling electricity to the *public* at retail. (emphasis added)

Thus, the question raised by CMP's complaint is whether the proposed transaction constitutes a sale to the "public." We find that it does not.

In making our determination, we apply the same "public use" considerations as discussed above to the question of "public sale" in considering whether Boralex would be a CEP. The use of the same considerations is appropriate because, prior to restructuring, providers of generation services would have only been considered utilities if the "public use" test were satisfied. There is no indication that the Legislature intended to transform generation services that did not constitute utility service prior to restructuring into CEP services after restructuring.

Our conclusion that Boralex is not a CEP is also supported by the statutory definition of "generation service." Generation service is defined as:

> the provision of electric power to a consumer *through a transmission and distribution utility* . . . .

35-A M.R.S.A. 3201(11) (emphasis added). The fundamental aspect of the Restructuring Act is the deregulation of "generation services," 35-A M.R.S.A. § 3202(2). It is thus reasonable to conclude that the Legislature viewed CEPs as the entities that would provide "generation service" after restructuring and that service would be provided through T&D utilities. Thus, our finding that Boralex will not be providing service through T&D facilities supports our conclusion that Boralex is not a CEP.

CMP argues that if activity such as that planned by Boralex is not considered CEP service, some entities that sell electricity will have an unfair competitive advantage because CEPs have to comply with statutory and regulatory requirements (e.g., portfolio requirement). Although CMP's unfair competition argument may have merit, the statute specifies that an entity is a CEP if it sells electricity to the "public." By specifying public sales, we conclude that the Legislature was aware that "private sales" could occur that would not be covered by the requirements of the Restructuring Act. If the Legislature had intended to cover all electricity sales, whether "public" or "private," the definition of CEP would not have been restricted to public sales.

D. Conclusion

For the reasons discussed above, we conclude that Boralex's planned activity would not make it either a T&D utility or a CEP. A formal investigation to obtain additional facts is, therefore, not warranted.

Dated at Augusta, Maine, this 6th day of April, 2001.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent

Diamond: See attached Dissenting Opinion

Dissenting Opinion of Commissioner Stephen Diamond

I dissent from the conclusion of my colleagues that under the facts presented here Boralex would as a matter of law not be a transmission and distribution utility.

Under 35-A M.R.S.A. § 20-B, a transmission and distribution utility is a person "… owning, controlling, operating or managing a transmission and distribution plant for compensation…." Under 35-A M.R.S.A. § 20-A, transmission and distribution plant "… means all … property owned, controlled, operated or managed in connection with or to facilitate the transmission, distribution or delivery of electricity … for public use…."

It does not appear to be disputed that Boralex will be owning and operating property in connection with the delivery of electricity for compensation. The issue is simply whether the delivery of the electricity should be deemed to be "for public use."

As reflected in the federal and state securities laws, it is not uncommon to limit the reach of regulatory schemes to transactions with the "public." How broadly one interprets "public" can vary greatly depending on the interest that the Legislature is seeking to protect. What makes the instant case particularly difficult is the absence of any legislative history on this question.

To be more specific, if the objective underlying the statutes requiring interpretation is to protect consumers who may be unable to protect themselves in dealing with sellers of electric delivery service, a narrow definition of "public use" would seem appropriate. Indeed, borrowing from the concept of a private placement in the securities laws, I can envision an interpretation that allows an unregulated entity to sell delivery service to all of the State's large industrial customers, assuming the entity does not publicly advertise, on the theory that the buyers are sophisticated consumers who

do not need the protection of the regulatory scheme. By contrast, if the purpose is to safeguard the existing utility's franchise, not only for the benefit of the utility but also to protect customers whose prices might increase if unregulated providers of delivery service were able to lure away the utility's choice accounts, the appropriate interpretation might be very different. Indeed, against that backdrop, allowing an unregulated competitor to take over all of a transmission and distribution utility's large industrial business could be very damaging to its other customers.[4]

In its order, the Commission appears to adopt a franchise protection rationale for the relevant statutes, stating that "based on the general purposes of the statutory scheme, we conclude that the Legislature did not intend the 'public use' requirement to be a means to allow for the gradual degradation of utility service territories…."[5] Even if that is the correct rationale, it may not end the policy inquiry, as there may also be a legitimate public interest in not unnecessarily restricting customer choices or unduly deterring creative alternatives to current ways of doing business. Indeed, there may be a need to engage in the type of difficult line drawing that can only be carried out when the underlying policy objectives have been clearly identified.

The questions raised by this case demonstrate that the Commission sorely needs more legislative guidance in interpreting these statutes, particularly in the context of the recent restructuring of Maine's electricity industry. While the five considerations invoked in the Commission's order reflect an admirable attempt to distinguish between "public" and "private," the order gives little attention to articulating the underlying policy considerations and none to balancing what may be competing interests. It applies narrow legal craftsmanship to an issue that cries out for broad policy making.

My preference would be to employ a very narrow, bright line test in allowing non-utilities to enter the electricity delivery business and to expressly state the need for further legislative guidance. Specifically, I would provide that the public use requirement is satisfied if an entity is delivering electricity to an unaffiliated entity for compensation, which would presumably make Boralex a transmission and distribution utility in this instance.[6]

This approach strikes me as having two advantages over the Commission's order. First, it preserves the status quo pending a consideration of the larger policy

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[4] This is particularly true when there are significant stranded costs yet to be paid off.

[5] It is not clear to me from the order why one should not view the result reached in this case as potentially the first step in "the gradual degradation of utility service territories."

[6] My conclusion is tentative as I would give the parties the opportunity to present more information in the context of the test that I advocate.

issues.[7] Second, it avoids the ambiguity that inevitably stems from a test that is simply a list of different "considerations." For example, under the Commission's order, one consideration that keeps Boralex from being a transmission and distribution utility is the fact that it obtains its fuel from its customer.[8] Where does that leave matters if Boralex begins to obtain fuel elsewhere? Is there a certain amount of fuel that must come from the customer for this consideration to be satisfied, and if it is not satisfied, does Boralex become a utility? I can see an endless variety of questions that might have to be resolved under the Commission's test without the benefit of a clear policy framework.

I should emphasize that I view my proposed resolution as temporary and not as reflecting any ultimate opinion on how the underlying policy issues should be resolved. Furthermore, I recognize that while the Commission can invite further legislative consideration of an issue, the Legislature has the perfect right to ignore our invitation, leaving open the question of how we should then proceed for the long term. In that event, I would be inclined to address this issue through a rulemaking, see 35-A M.R.S.A. § 111, as that would allow us to give full consideration to all of the underlying policy issues and to deal with the matter on a more comprehensive basis than may be possible in a case-by-approach.

Turning to the question of whether Boralex should also be deemed a competitive energy provider (CEP), I do not dissent from the result reached by the Commission. CEPs do not have protected franchises; indeed, the objective here is to have as much competition as possible. Accordingly, I see the purpose of the phrase "selling electricity to the public," in 35-A M.R.S.A. § 3201(5) as clearly one of consumer protection, and thus, I have no problem with a result that effectively provides that selling electricity to one sophisticated customer does not constitute selling to the public.

[7] Current law clearly allows self-supply, and my test would essentially provide that delivery of power by an affiliate falls within that concept. It would hold off going further until resolution of the policy issues on the theory that it is far easier to allow this type of activity to develop than it is to rein it in after investments have been made and commercial relationships established.

[8] The relevant consideration in the order is that "the generator and customer have a commercial … relationship beyond the sale of electricity."

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.